

in opinion

1954

September 10

Ralph C. Carpenter, 2nd, Director
 Fish and Game Department
 State House Annex
 Concord, New Hampshire

Dear Sir:

You have requested the assistance of this office in determining the right of a property owner to protect his property from injury and damage caused by wild birds and wild animals.

The New Hampshire Constitution in Part

First, Article 2d. states:

"All men have certain natural, essential, and inherent rights -- among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness."

The legislature has further provided that certain game birds and animals may be pursued and killed only at certain times of year and in a stated manner. The question is therefore raised as to whether such laws do not prevent an owner of property from exercising his constitutional rights.

The ownership of game, as far as it is capable of being owned, is in the state in its sovereign capacity for the benefit of all its people in common. As part of the police powers of the state, the legislature may enact legislation regarding the protection and propagation of game. 16 C.J.S. Constitutional Law, s. 467; Cook v. State, 74 P.2d. 199, (Wash); Rosenfeld v. Jakways, 216 Pa. 776, (Mont); State v. Dow, 70 N.H. 286.

A statute or ordinance enacted in pursuance of the police powers of the state for the promotion of the general welfare of the public may impose reasonable regulations and restrictions

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on the use and control of private property without depriving a person of his property in violation of his constitutional rights. 16 C.J.S. Constitutional Law, s. 602; Cram v. Laconia, 71 N.H. 73.

Recognizing that game laws must come within the limitations imposed by the state and federal constitutions, the legislature has provided two methods to insure that property owners may protect their property or be recompensed for loss occasioned by game enjoying the state's protective laws. The first method is to reimburse the owner for crop damage, such reimbursement to be figured as of the time of harvest. R.L. c. 241, ss. 20 and 21. The second method is to permit the owner, his family or employees, to kill, on land owned or occupied by him, any protected bird or animal which he finds in the act of doing actual and substantial damage to his property. R.L. c. 241, s. 24. It is with this section that we are primarily interested.

Any person charged with killing game contrary to law must interpose as a defense, legal justification. Whether this is a good defense depends upon the facts of each case. If, in fact, the killing was by the owner, his family or an employee; on land of the property owner; while doing actual and substantial damage; reasonably necessary for the protection of persons or property; using only such force and means as a reasonably prudent man would use under like circumstances; then he is justified under our statutes in killing such protected game. These elements are matters which must be presented and approved by the court, and may not be hypothetically approved in advance.

In this regard, the celebrated "mink" case cited as Aldrich v. Wright, 53 N.H. 398, which establishes the proposition that the property owner may kill protected animals when his property is in "apparent" as well as real danger, may be distinguished on its facts. While this is still good law, it would apply more aptly to the protection of livestock apparently in danger of being exterminated by some protected animal. In this regard apparent danger should not be confused with contemplated danger. The legislature has specifically stated that the landowner must find wild game or birds in the act of doing damage. To kill a deer because it is apparently threatening the owner's garden, does not appear to be reasonable under the circumstances.

In view of modern methods of fencing and the use of artificial deer frighteners, it would likewise seem unreasonable for the property owner to institute a concerted drive to slaughter deer roaming his land. While as a matter of law the use of "jacks" to protect his property is not specifically prohibited, the landowner should recognize that this opens the door to real violators of the jacking law, and in the interests of public good, such means should be confined to clear cases of necessity.

In conclusion may I state that, as written, our laws provide adequate protection for the landowner, and are clearly constitutional. Loose talk on the right to protect property may easily be misconstrued. Is it reasonable to kill a valuable dog that happens to be digging a

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hole in your front lawn? Can you kill a young boy stealing your apples? These questions need no answer, and yet, where is the line to be drawn? By merely considering these questions it becomes increasingly clear that a land-owner must use reasonable means, under all the circumstances, in his actions to protect his property.

Very truly yours,

Arthur E. Bean, Jr.
Assistant Attorney General

AEB,Jr/T